No. 6483

United States
Circuit Court of Appeals
For the Ninth Circuit.

AMERICAN SURETY COMPANY OF NEW YORK,
a corporation,

Appellant,

—vs.—

COVE IRRIGATION DISTRICT,
a corporation,

Appellee.

Brief of Appellant

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STATEMENT OF THE CASE

This case was previously before the Court as Cause No. 5861 upon its docket. It was finally decided under date of June 2nd, 1930, by a divided court, Mr. Justice Wilbur dissenting. See Cove Irrigation District vs. American Surety Company of New York, 42 Fed. (2d) 957. Under that decision the judgment theretofore entered in favor of the American Surety Company of New York was reversed with directions to the lower court to take further proceedings not out of harmony with such decision.

After the issuance of the usual mandate from this Court, the District Court of the United States for the District of Montana, without further trial, adopted certain findings of fact and conclusions of law based upon the record theretofore made, namely, the record that came to this Court in Cause No. 5861. Thereupon judgment was entered in favor of the Irrigation District and against the Surety Company, upon February 18th, 1931, for $17,963.72, together with interest thereon and costs of suit. It is from that judgment that an appeal has now been taken to this Court.

As Cause No. 5861 upon the docket of this Court, the entire record theretofore made was before the Court and consisted of the pleadings, the judgment then outstanding, and a bill of exceptions of all of the evidence, together with the other usual papers upon an appeal. That record was printed, as in any appealed case. It was duly served as well as filed and is now a part of the permanent records of this Court. Therefore, in the proceedings upon the present appeal, or the second appeal in the case, the printed transcript of record therein, which has been docketed as Cause No. 6483, upon the records of this Court, includes merely the proceedings taken in the lower court subsequent to those embodied in the printed record here in Cause No. 5861. Thus the printed transcripts of record in Causes No. 5861 and 6483 constitute the full record in the case up to the present time. With no defined practice on the subject outlined by the rules of this Court, it seemed to us that the interests of justice would be fully subserved on this second appeal if only the portion of the record not heretofore filed in this Court was submitted as the record on such appeal. Then this Court would have, through a combination of the two transcripts, a complete

record in the case. Thereby duplication in the record of the pleadings as well as of the bill of exceptions of the evidence would be avoided and more than a considerable amount of expense saved to the litigants involved. In the praecipe for a transcript of the record upon the present appeal, that is, in docketed Cause No. 6483, which praecipe was duly served as usual upon opposing counsel, the following appears:

> "A transcript of the pleadings in this action and of the proceedings had at the trial of the same was prepared by your office under date of June 11, 1929, in connection with a previous appeal herein, and was duly filed in the Circuit Court of Appeals for the 9th Circuit upon the 17th day of June, 1929, as Cause No. 5861, upon the docket of that court. Therefore, this praecipe directs you to prepare a transcript of such further record and proceedings in said action as are necessary, with the record and proceedings previously prepared, to provide the said Circuit Court of Appeals for the 9th Circuit, with a complete transcript of the record and proceedings in said action." (Tr. (2) 24 and 25)

Opposing counsel did not attempt to have further matter included in the record upon the present appeal by a counter-praecipe to the clerk of the lower court, as might have been done under well recognized practice, and therefore should not be permitted to object to the form or sufficiency of the record herein. Furthermore, the practice followed on this second appeal appears to us to have been sanctioned by the Circuit Court of Appeals for the First Circuit in Nashua & Lowell R. Corp. vs. Boston & Lowell R. Corp., 61 Fed. 237. There the court holds, in substance, that, when there has been a previous appeal, matters preceding the mandate should ordinarily be omitted from the transcript of the record when a further appeal is taken.

It will be necessary in this brief to refer to each of the two

transcripts. For convenience, the transcript in Cause No. 5861 will be referred to as "Tr. (1)", and the transcript in Cause No. 6483 as "Tr. (2)", with proper page numbers following such references.

The contention of the Appellant upon this appeal is that the allowance of interest, prior to judgment or, possibly, prior to the adoption of the findings upon the claims involved in suit, is contrary to law. The judgment of February 18, 1931, for $17,963.72, includes a large sum allowed for such interest as the findings disclose. (Tr. (2) 2 to 7) This contention is based upon the pleadings and the evidence in the bill of exceptions which, it will be argued, do not support the findings or the judgment. Under its decision (42 Fed. (2d) 957), the majority of the Court herein merely held, in substance, that the Cove Irrigation District could maintain an action to recover certain unpaid accounts of subcontractors and materialmen. No question of interest was involved or decided.

Briefly the facts surrounding this litigation are as follows: Some years ago Schlueter Brothers contracted to build certain works of irrigation for the Cove Irrigation District. Much of the work was done by subcontractors and materialmen under Schlueter Bros. These main contractors defaulted, leaving their subcontractors unpaid in whole or in part. The American Surety Company of New York wrote the usual bond to secure the performance of the contract between Schlueter Brothers and the Irrigation District. The pending suit was brought by the Cove Irrigation District to recover, for the use and benefit of the various subcontractors and materialmen, such amounts as they were unpaid for work and labor done and materials furnished. It is the contention of the Appellant here that this action by

the Cove Irrigation District, for the benefit of the persons mentioned, is in quantum meruit, for the reasonable value of the work and labor done and materials furnished by the subcontractors, et al., and that none of the claims involved was liquidated, so that interest could be allowed thereon, until the entry of the judgment of February 17th, 1931. (Tr. (2) 14 and 15)

After the case was remanded by this Court to the lower court to take further proceedings not out of harmony with the decision in 42 Fed. (2d) 957, counsel for the Irrigation District made a request for findings of fact and conclusions of law. (Tr. (2) pages 2 to 12) This request was based upon the record that came to this Court in Cause No. 5861. Hence, as stated therein (Tr. (2) 2) they *renewed* a request for findings. Thereby, in effect, they asked the Court to find that the various subcontractors and materialmen should be paid not only the balances unpaid for their work, labor and material, but also interest thereon from the time the work and labor was done or materials were supplied. The lower court thereafter made an order (Tr. (2) 13) adopting and approving such request for findings of fact and conclusions of law, with certain modifications, and over the objections of the Appellant herein. Those modifications relate only to the principal amounts of certain of the individual claims involved. Interest, however, was allowed on all of such claims from 1922 or thereabouts, when the work was done, etc., although, according to Appellant's contention, the claims were not liquidated so that they could have been paid until the adoption of the findings in 1931. The judgment herein (Tr. (2) 14 and 15) is for $17,963.72 which, of course, bears interest thereafter, or from February 18th, 1931. It is computed by taking the principal amounts allowed each claimant, which total

$10,870.40, and by adding thereto the interest here complained of, figured at the legal rate of eight per cent. per annum. A detailed statement of the amounts demanded and of the recovery allowed will be set forth later in this brief. It will suffice now to say that the principal amount demanded by the Cove Irrigation District in its complaint was materially cut down by the court's findings, although, as stated, interest was allowed thereon from the time the work and labor was done or materials supplied to the date of the findings or judgment of 1931. Thus Appellant contends that the judgment illegally includes an allowance of $7093.22 for interest, and this appeal has accordingly been prosecuted to settle that question.

Before the present appeal was taken Appellant made a motion in the lower court to modify the judgment in accordance with its contentions, by eliminating therefrom the interest allowances complained of, (Tr. (2) 15 and 16) but the motion was denied. Tr. (2) 16 and 17) The appeal herein is also from the order denying the motion to modify the judgment. (Tr. (2) 17 and 18)

SPECIFICATIONS OF ERROR

The Lower Court erred:

1. In the making and entry of its said judgment bearing date of February 18, 1931, in that (a) the said judgment is contrary to law, and, (b) the said judgment is not supported by the record in said action, and, (c) the findings upon which the said judgment is based are contrary to law and without evidence to support them as to interest allowed prior to judgment.

2. In the denial of the motion of the Appellant to modify the aforesaid judgment by the elimination therefrom of the interest allowed prior to judgment in that the claims sued upon were each and all unliquidated prior to the findings of the court and the entry of the said judgment.

OUTLINE OF ARGUMENT

ARGUMENT.

I.

MONTANA STATUTES AND DECISIONS CONTROL THE ALLOWANCE OF INTEREST HEREIN.

The record as a whole discloses, without any manner of dispute, that the Cove Irrigation District is a public corporation organized under the laws of the State of Montana, and transacting business therein. The contracts made by Schlueter Brothers, the main contractors, with the subcontractors, et al., to construct the works of irrigation, were so made in Montana, and the work thereunder was done there upon the properties of the Cove Irrigation District. Therefore, it is settled law that the right, if any, to interest on their claims of these subcontractors, et al., or of the Cove Irrigation District suing here, as it does, in their behalf, must be determined by local law, that is, by the Montana statutes and decisions.

In Bond, et al. vs. John V. Farwell Co. (C. C. A. 6th) 172 Fed. 58 and 65, the court says:

> "Interest being a matter of only local regulation, the decisions of the courts of last resort of the states are binding upon the courts of the United States."

To sustain its conclusion the court, in the last cited case, cited in part Ohio vs. Frank, 103 U. S. 697, 26 L. Ed. 531. There, quoting from one of its previous decisions the Supreme Court of the United States says:

> "The rule heretofore applied by this court, under the circumstances of this case, has been to give the contract rate up to the maturity of the contract, and thereafter the rate prescribed for cases where the parties themselves have fixed no rate. * * * When a different rule has been established, it governs of course, in that locality. ...*The question is always one of local law.*"

In Illinois Surety Company vs. John Davis Company, et al., 244 U. S. 376, 61 L. Ed. 1206, the court, upon page 1212 of the Lawyer's Edition Report, says:

> "The contract and bond were made in Illinois and were to be performed there. Questions of liability for interest must therefore be determined by the law of that state."

In Columbus, S. & H. R. Co. Appeals (C. C. A. 6th) 109 Fed. 177, 194, the court says:

> "But in Mortgage Co. v. Sperry, 138 U. S. 313, 338, 11 Sup. Ct. 321, 329, 34 L. Ed. 969, 978, interest upon coupons was disallowed, following the law of Illinois, the obligations being payable in that state, and according to the law of that state. In reference to the law to be applied, the court said:
>
> 'Each contract of loan was made and was to be performed in Illinois, and each bond provides that it is to be construed by the laws of Illinois. Interest upon interest, as represented by the coupons, must, therefore, be allowed or disallowed, as may be required by the law of that state. In Illinois the whole subject is regulated by statute, and interest cannot be recovered unless the statute authorizes it.'
>
> This decision accords with the general rule that, in the absence of a stipulation to the contrary, the law of the place of performance will control in respect to the subject of interest. Miller v. Tiffany, 1 Wall. 298, 17 L. Ed. 540; Paley, Int. 187."

In Sloss-Sheffield Steel & Iron Co. vs. Tacony Iron Co. 183 Fed. 645, the court says:

> "Where interest is given for breach of contract, the general rule is that the rate recoverable is according to the law of the place of performance, irrespective of the law of the place where the contract was entered into or the jurisdiction in which the suit is brought. 22 Cyc. 1477; 16 Amer. & Eng. Ency. of Law, 1090; Wharton's Conflict of Laws (2d Ed.) 1227; Pana v. Bowler, 107 U. S. 529, 2 Sup. Ct. 704, 27 L. Ed. 424; Scotland County v. Hill, 132 U. S. 107, 10 Sup. Ct. 26, 33 L. Ed. 261."

The law has been so stated also in effect in the following authorities, most of which are controlling, to-wit:

Holden vs. Freedman's Savings & Trust Co. et al., 100 U. S. 72, 25 L. Ed. 567.
Mass. Benefit Association vs. Miles, 137 U. S. 689, 34 L. Ed. 834.
City of New Orleans vs. Warner, 175 U. S. 120, 44 L. Ed. 96, 109.
Cromwell vs. County of Sac, 96 U. S. 51, 24 L. Ed. 681.
The County of Scotland vs. Hill, 132 U. S. 107, 33 L. Ed. 261.
City of Cairo vs. Zane, 149 U. S. 122, 37 L. Ed. 673.
33 C. J., Interest, paragraphs 16 to 20.
12 C. J., Conflict of Laws, paragraph 34, page 452.

In the next paragraph hereof consideration will be given to the character of the claims involved, as disclosed by the record. Then, in the concluding subdivision of this brief, the argument and citations will disclose that, under local law, that is, the law of Montana, where the contracts here involved were made and performed, such claims as are here sued upon do not draw interest prior to the time when they become liquidated by findings and judgment.

II.

CLAIMS INVOLVED HEREIN ARE IN QUANTUM MERUIT AND WERE ALL UNLIQUIDATED PRIOR TO FINDINGS AND JUDGMENT.

In the complaint in this action (Tr. (1) pages 1 to 18) it is alleged, in substance, that the Cove Irrigation District made a certain contract with Schlueter Brothers for the improvement of its irrigation system and that the Appellant here, the American Surety Company of New York, wrote, as surety, the bond given to secure the performance of that contract. It is then further alleged that these contractors employed various named persons to perform work and furnish materials upon the work so undertaken by them, that is, by Schlueter Brothers, and that the said persons, at the special instance and request of Schlueter Brothers, performed work and labor and furnished materials in and about the construction work for which they were either not paid at all or only partially paid. Paragraph H of that complaint, with various subdivisions thereunder, (Tr. (1) 12 to 15) relate to the claim of B. J. Martin, who was a subcontractor under Schlueter Brothers. Paragraph H-6 (Tr. (1) 14 and 15) reads as follows:

> "That the said subcontract between the said B. J. Martin and Schlueter Brothers furnishes no basis for measuring the amount due the said B. J. Martin for such labor and materials so furnished by him * * * and that the said B. J. Martin has heretofore elected to claim the reasonable value of the labor and materials so furnished by him as the amount due him and as the measure of his compensation."

Then in paragraph H-7 (Tr. (1) 15) it is specifically alleged that Martin performed work and labor and furnished and delivered materials to Schlueter Brothers, which were of a certain *reasonable value.*

It is clear, without further discussion, that the claim asserted in behalf of the subcontractor Martin is upon a quantum meruit and not upon the express contract.

The claims of each of the other subcontractors are pleaded alike. Thus in the case of B. A. Kurk it is alleged (Tr. (1) 8):

> "That under such a subcontract with said Schlueter Brothers one B. A. Kurk, between the 15th day of October, 1922, and the 12th day of January, 1923, at the special instance and request of said Schlueter Brothers, did and performed work, labor and services for said Schlueter Brothers, consisting of excavation work upon said irrigation system which were of the reasonable value of $2075.00 and which was also the agreed price therefor, and which said Schlueter Brothers contracted and agreed to pay."

Then follows an allegation of demand for payment and nonpayment of a balance claimed to be due and owing.

It will be observed that the express contract between Schlueter Brothers and Kurk is not pleaded in haec verba nor is the substance of the express contract pleaded in the complaint. Beyond the fact of employment and that the "agreed price" is identical with the reasonable value of the work, labor and services involved, the terms of the express contract are not pleaded. Nor is any breach of the express contract pleaded. Who can say from this complaint that the sum demanded was due or payable under the express contract, the terms of which are not even set forth? When and how was Kurk to be paid under the express contract? This is left entirely to speculation. Upon this ground alone it is settled law that a cause of action is not set forth upon the express contract in the complaint. Thus, in 13 C. J., page 731, under the subject of Contracts, paragraph 863, the author says:

> "There can be no recovery unless the complaint sets forth

> a breach by it of the contract in suit. It is not enough to show a right of action against it, that the promise or covenants of the respective parties are fully set out, with the averment of performance on the part of plaintiff; plaintiff is bound to go further and in due form to assign such breaches of its promises or covenants as are relied on as grounds for a recovery of damages."

On the contrary, all of the elements of a cause of action in quantum meruit are alleged. Thus in 40 Cyc 2839, the author says that a complaint upon quantum meruit:

> "Must show that the services were actually rendered, by whom they were rendered, and that they were not rendered gratuitously. Non-payment of the debt set out must be alleged."

Furthermore, if the portion of the complaint here being considered was designed to state a cause of action upon an express contract why is the allegation made therein that the work, labor and services "were of the reasonable value" of so much? The purpose of the pleader in setting forth, as has been done, that the reasonable value and agreed price are synonymous, is plain, and merely confirms the contention here made that the cause of action stated is in quantum meruit and not upon the express contract. Thus, in Donovan vs. Bull Mountain Trading Company, 60 Mont. 87, 198 Pac. 436, the Supreme Court of Montana has said:

> "Where a recovery is sought as in quantum meruit, and the evidence reveals a special contract, the measure of recovery is to be limited to, or must not exceed the amount specified in the contract."

Clearly the pleader has invoked the rule announced in Montana in Clifton, Applegate & Toole vs. Big Lake Drain District No. 1, 82 Mont. 312, namely:

> "A contractor may, on breach of the contract by the other party to it by refusal to make a payment becoming

> due to him during the progress of the work as provided therein, discontinue work and elect either to sue upon the contract to recover damages for its breach, or ignore the contract and bring action on quantum meruit."

In other words, the pleader has elected to sue in quantum meruit because of a breach of the express contract. The claims of the remaining contractors are pleaded in identical language, with the exception of the claim of Martin, which, as pointed out, is expressly alleged to be in quantum meruit.

But turning to the evidence in the bill of exceptions it will be found that the engineer on the job was permitted to say how much work most of the subcontractors did and what they should be paid. (Tr. (1) 164) The reasonable value and agreed price of work done by two other subcontractors was stipulated. (Tr. (1) 150, 151) Wickliff, another subcontractor, testified that he bases his claim on "force account" (Tr. (1) 159) because he never got any remittances under his contract. That claim, of course, is in quantum meruit. No effort was made to prove the different terms of the several express contracts between the individual subcontractors and Schlueter Brothers, although in the amended and supplemental answer of the Surety Company (Tr. (1) 27) the allegations of the paragraphs of the complaint, (Tr. (1) 7 to 16) relating to the contracts between Schlueter Brothers and the individual contractors, are expressly denied.

In the light of the foregoing analysis of the record it seems obvious, without further comment, that the claim of each subcontractor, as made by the Cove Irrigation District herein, is upon a quantum meruit and nothing else. Supplementing the reference, supra, to the case of Donovan vs. Bull Mountain Trading Company the following is quoted from State of Min-

nesota vs. Davis, 17 Minn. 429, 438, which was an action in quantum meruit, viz:

> "It seems to us that the defendants having in effect prevented the performance of the special contract, this action lies to enable the plaintiff to recover such compensation for his services and materials as may be reasonable in view of the facts of the case. But as the plaintiff has the right to insist that he shall not lose anything by the fault of the defendants in thus preventing the performance of the contract, he has a right to claim that he shall receive as much for such materials and services as he would have received for the same if he had gone on and completed the special contract. *For this purpose it was naturally proper for him to refer to such a special contract (in his pleadings) as furnishing a basis upon which the amount of his recovery might be estimated.*"

Also in Joern vs. Bank (Mo.) 200 S. W. 737, syllabus 1 of the case reads as follows, to-wit:

> "A contractor's petition for work and material, setting forth the contract, though not alleging that it was not completed, but enumerating the reasonable value of the materials furnished and services rendered, at the request of the defendant, and stating the amounts sought to be charged therefor, was a declaration on a quantum meruit and not on contract."

See also Puterbaugh vs. Puterbaugh, (Ind.) 33 N. E. 808.

The effect of these authorities is to establish clearly that mere incidental reference, as here, to an express contract does not make the claims here involved suits upon that contract.

In C. M. & St. P. Railroad Company vs. Clark, 92 Fed. 968, 975, the Circuit Court of Appeals for the Second Circuit holds that the term "unliquidated," as used in connection with creditors' claims, means that the creditors:

> "Must bear some further burden in order to have their amounts so fixed that the debtor would be bound thereby."

Then the court further says:

> ....."*This is always the case where the creditor's claim rests upon a quantum meruit.* Thus, where a physician charged $5 a visit for 126 visits, and $10 each for 4 consultations, no agreement having been made in advance as to the rate to be charged, the court said: 'The original contract, which the law implied, was an agreement on the part of the defendant to pay the plaintiff what his services were reasonably worth. From the very nature of the case, a further agreement must be reached by the parties, fixing the value of the services, or else resort must be had to a judicial determination for that purpose.' Fuller v. Kemp (1893) 138 N. Y. 236, 33 N. E. 1034. In that case the consideration on which accord and satisfaction was sustained was the giving up by the debtor of his right to compel the plaintiff to resort to judicial determination to fix the quantum meruit of the visits he did make, even if there were no dispute as to their number. And it is manifest that it makes no difference, when such claim is being adjusted, that the creditor agrees to a quantum meruit which he was always willing to pay; because, so long as the fixation of the amount rested merely on his good will, he was still in a position to change his mind. He could still, in perfect good faith, verify an answer which would make it necessary for the creditor to 'liquidate' his claim by a lawsuit."

In the next subdivision of this brief and in connection with the further argument then made many authorities will be cited on the point that a claim in quantum meruit is an unliquidated claim.

The claims here sued upon were unliquidated in every sense of the word because it took a trial, evidence and findings of the court to fix the amount of the liability of the Surety Company. The quantities of material removed, etc., had to be determined by evidence, the amount and kind of material supplied and the reasonable value therof, before it was possible for anyone to say what amount, if any, the Surety Company should pay.

The Surety Company expressly denied the liability asserted and the reasonable values alleged (Tr. (1) 27) and the Irrigation District was put to its proof. Then, too, it was necessary for the lower court in the exercise of its discretion, the case having been tried to the court without a jury, to determine to what extent, if at all, the evidence supported the claims pleaded in the complaint. In other words, the "reasonable value" of the labor and materials, for which this suit is prosecuted, required determination, and prior to determination, particularly where, as here, the claims of the Plaintiff were disputed by the answer of the Surety Company, nothing short of a judicial determination could fix the amount payable by the Surety Company. Thus, on general principles, apart from any statutory rules or decided cases, there would appear to be no common sense reason why the Surety Company in such a suit should be required to pay interest until the amount of its liability was fixed and determined by judgment. But this phase of matters and the rules of law applicable in such cases will be fully discussed in the next subdivision of this brief.

III.

UNDER LOCAL LAW ALLOWANCE OF INTEREST PRIOR TO LIQUIDATION OF CLAIMS BY JUDGMENT IS PROHIBITED WHERE, AS HERE, SUIT IS IN QUANTUM MERUIT.

Before citing the statutes and decisions in Montana that announce the rule contended for in this subdivision hereof, the attention of the Court is respectfully invited to the fact that the law generally is as stated, namely: that unliquidated claims do *not* draw interest until they have been merged in judgment, and that claims in quantum meruit are of this class. Thus in 33 C. J., Interest, page 211, paragraph 71 and 72, the author says:

> "Although it is competent for the parties to agree to pay interest on an amount as yet unascertained and to be liquidated in the future, the general rule * * * is that interest is not recoverable upon unliquidated demands, but is allowable only after such demands shall have become merged in a judgment. In order to recover interest there must be a fixed and determinate amount which could have been tendered and interest thereby stopped. * * * The general rule which denies the right to interest on unliquidated demands has found very frequent application in the case of unliquidated demands for services rendered, which as a general rule do not bear interest until rendition of judgment."

Numerous cases are cited in the note to the text, some of which will be specifically mentioned later herein, holding that a claim in a quantum meruit for work, labor or materials is within the rule.

It is of very great interest also to note the decision of this Court in Valentine vs. Quackenbush, 239 Fed. 832. There the Court considers a statute of Alaska that is, in substance, the

same as an Oregon statute regulating interest allowances. In effect, we consider that the statute so involved is the same as the Montana interest statutes. None of these statutes provides for interest on what may be called unliquidated demands. The Court, in the Quackenbush case, treats the demand there involved as unliquidated. It is one that was disputed by the defendant, even though the suit was upon an express contract. Hence the judgment was modified by eliminating therefrom interest prior to such judgment.

But this Court is primarily concerned here with the interest rule in Montana, or the local law on the subject. Such local law governs the case and is controlling upon the federal courts, as has been pointed out under Subdivision I of the argument herein.

In the very early case of Palmer vs. Murray, 8 Mont. 312, 21 Pac. 126, the Montana court laid down the doctrine, as stated in the syllabus of the case, that:

> "No interest can be recovered on an unliquidated demand until the amount thereof has been ascertained."

For the convenience of the Court, as well as for clarity of argument herein, we quote the following from the Court's decision, viz:

> *"Where interest, eo nomine, is asked for on* the amount demanded as damages, *it must be allowed or denied as provided in the statute.* * * * The obligation of the defendant was to repair the injury done * * * but it did not certainly extend to the obligation to pay interest, for that is a separate and distinct obligation, which could exist only by contract, and in the absence of any express agreement under the provisions of the law itself; for it has been repeatedly said that interest is a creature of the law. The law making power in Montana has undertaken to regulate the rates of interest, and to specify the contracts and debts which shall

bear interest, in the absence of any express agreement therefor. * * * *The statute regulates interest* in a variety of cases in which there is no agreement, *and it will be noticed that it includes all kinds of demands, except those for damages or unliquidated claims.* After enumerating such a number of cases in which interest is to be allowed in the absence of any agreement, it is hardly to be contended that it would leave open the question of interest on so important a subject as that of damages. We have no doubt that it was never the intention of the law to allow interest on demands for damages from the date of the act complained of, but only from the date of the damage when ascertained by judgment. * * * *The general rule is deducible that interest is not to be allowed on any demand except from the day on which the exact amount is ascertained.* Does any reason satisfactory to the mind exist, why interest should be denied to the creditor until there has been a settlement agreed upon, and yet allowed on an unascertained and disputed demand for damages, long before it can be known whether any debt or liability on the part of the defendant actually exists? In order to determine in this action whether any debt, and if so, what amount, actually existed on the part of the defendant, it took the judgment of the court to so decide. * * * I take it to be the rule, in the absence of any agreement, that interest eo nomine will not be allowed except when the statute permits. This construction of the statute is under the well known rule of interpretation found in the maxim of expressio unius est exclusio alterius. *Having specified the cases in which interest shall antedate the judgment, the natural conclusion is that the law maker intended to exclude or deny the right in instances not so enumerated."*

In the Palmer case the court refers to its previous decision in Isaacs vs. McAndrew, 1 Mont. 437, 454. There, *in an action in assumpsit* for money paid, laid out and expended for the defendant, the court specifically held that interest was not allowable under the terms of the statute. The statute so construed is found in the laws of 1865 of the Territory of Montana at page 535, and reads as follows, viz:

"Creditors shall be allowed to collect and receive interest when there is no agreement as to the rate thereof, at the rate of ten per cent. per annum for all moneys after they become due, on any bond, bill, promissory note, or other instrument of writing, and on any judgment rendered before any court or magistrate authorized to enter up the same, within the Territory, from the day of entering up such judgment until satisfaction of the same be made; likewise on money lent, or money due on the settlement of accounts, between the parties and ascertaining the balance due; on money received to the use of another, and retained without the owner's knowledge, and on money withheld by an unreasonable and vexatious delay."

This statute is practically the same as Section 1257, 5th Division, Compiled Statutes, 1887, that was construed in Palmer vs. Murray, supra. The 1887 statute in question reads as follows: viz:

"Creditors shall be allowed to collect and receive interest when there is no agreement as to the rate thereof, at the rate of ten per cent. per annum for all moneys after they become due, on any bond, bill, promissory note, or other instrument of writing, and on any judgment rendered before any court or magistrate authorized to enter up the same, within the territory, from the day of entering up such judgment until satisfaction of the same be made; likewise on money lent, or money due on the settlement of accounts, from the day of such settlement of accounts, between the parties, and ascertaining the balance due; on money received to the use of another, and retained without the owner's knowledge, and on money withheld by an unreasonable and vexatious delay."

It thus follows that a claim in assumpsit, under either of the statutes, supra, is an unliquidated one upon which no interest is allowable prior to judgment. A suit in quantum meruit is, of course, in assumpsit and one of the common counts.

5 C. J., Assumpsit, Action of, Sec. 5, pages 1380 and 1381.

The only Montana interest statutes that could possibly have

any application in the suit at bar are the following sections of the Revised Codes of Montana, 1921, namely:

> "Section 7725. Legal interest. Unless there is an express contract in writing fixing a different rate, interest is payable on all moneys at the rate of eight per cent. per annum after they become due on any instrument of writing, except a judgment, on an account stated, and on moneys lent or due on any settlement of accounts from the date on which the balance is ascertained, and on moneys received to the use of another and detained from him. In the computation of interest for a period of less than one year, three hundred and sixty-five days are deemed to constitute a year."

> "Section 8662. Person entitled to recover damages may recover interest thereon. Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor, from paying the debt."

It is clear that the 1921 statutes, supra, do not allow interest upon unliquidated claims any more than did the Statute of 1887, construed in Palmer vs. Murray, supra. Under Section 7725, supra, written instruments for the payment of definite sums, accounts stated, moneys lent or due on settlement of accounts, and moneys received to the use of another and detained from him, bear interest. In other words, the claims there involved speak for themselves and fix the amount to be paid. They are liquidated and draw interest accordingly. Under Section 8662, the same rule is applied to damages that are certain, or that can be made certain by a mere calculation. Hence, there is no substantial difference between the statutes of 1865, 1887 and 1921. As we have pointed out, supra, and will by many citations hereinafter in this brief, a claim upon quantum meruit is not certain

or capable of being made certain by mere calculation. The damages to be awarded in a suit in quantum meruit depend upon no fixed standard and are referred to the discretion of a jury, or of a court if the case is tried to the court without a jury, and such damages cannot be made certain except by accord, verdict or judgment, as the case may be. It is submitted, therefore, that Isaacs vs. McAndrew, supra, is decisive here.

No case has been found in Montana construing Section 8662, supra, in its relation, if any, to claims upon quantum meruit. However, California has an *identical* statute, to-wit: Section 3287 of its Civil Code. The California courts have uniformly held that, where plaintiff's claim is based upon a quantum meruit, said Section 3287 has no application, and that interest is not allowable there upon such a claim prior to judgment.

The California cases relied upon will be cited and referred to presently herein. First, however, we call the Court's attention to the well settled rule in Montana, announced in Mares vs. Mares, 60 Mont. 36, 199 Pac. 267, as stated in paragraph 2 of the syllabus of the case, viz:

> "Adoption of a statute from another state carries with it the construction placed thereon by the highest court of the state from which it is adopted."

The only rational conclusion to draw from the fact that the Montana and California interest statutes mentioned are identical is that the Montana statute was taken from California with the constructions placed upon it there.

We now take up the constructions of the California interest statute, Section 3287, of its Civil Code. The fact that claims upon quantum meruit, as here, do not draw interest under this interest statute is made exceedingly plain in Farnum, et al. vs.

California Safe Deposit & Trust Company, et al. 96 Pac. 788. The following is quoted from the decision in that case:

> "Appellants claim that the judgment is erroneous, in that it allows interest on all the claims from the date of the beginning of the suits. They argue that all the claims were disputed, and unliquidated, and that there was no way short of litigation by which appellants, who were strangers to the arrangements between the owners and the lien claimants, could ascertain what the proper amounts were. Its right to recover on all the claims was vested in the lienholders at or before the suits were commenced. Farnham's and Vockel's claims were for services at a fixed rate of compensation per day. The claims of the California Mill & Manufacturing Company, of the Humboldt Lumber Company, and of W. L. Taylor were for materials sold at the market prices. McCarl's claim was not allowed. *The claim of Weeks was upon a quantum meruit. All the claims except the last one were capable of being made certain either by computation or reference to market rates,* and consequently respondents were entitled to recover interest thereon. Macomber v. Bigelow, 126 Cal. 15, 58 Pac. 312; *Civ. Code, Sec. 3287. The claim of Weeks being for the reasonable value of his services was not capable of being made certain by calculation, and hence was not entitled to bear interest prior to the judgment. The judgment should be modified in this respect.* Cox v. McLaughlin, 76 Cal. 67, 18 Pac. 100. 9 Am. St. Rep. 164; Fox v. Davidson, 111 App. Div. 174, 97 N. Y. Supp. 603; Swinnerton v. Argonaut L. & D. Co., 112 Cal. 379, 44 Pac. 719."

In Burnett, et al. vs. Glas, et al. (Cal.) 97 Pac. 423, the Supreme Court of that state considers an action for the foreclosure of certain mechanics' liens. We are concerned here as to that case with the claims only of J. A. Dyer and of Watkins & Thurman. The Court, in setting forth the character of the claims of these persons in the decision says:

> "J. A. Dyer furnished materials under contract with the contractor for which the contractor agreed to pay 'the reasonable market price thereof from time to time as the same

> were furnished and as the work on said building progressed;' * * * Watkins & Thurman furnished materials 'to be paid for at the regular and usual market price in cash upon delivery of the same'."

In other words, these claimants sought to recover in quantum meruit for the reasonable value of materials instead of at an agreed price for the same. In determining the right, if any, of these claimants to interest, the Supreme Court of California in the decision in question says:

> "We are of the opinion that the claim of appellants that claimants Dyer and Watkins & Thurman were not entitled to interest prior to judgment is well founded. As to each of these claims, the amount due was unliquidated and not capable of being made certain by calculation until fixed by the judgment. The rule applied to such claims in Macomber v. Bigelow, 126 Cal. 9, 58 Pac. 312, namely, that interest prior to judgment cannot be allowed, was applicable. See, also, Stimson v. Dunham, etc. 146 Cal. 285, 79 Pac. 968. The judgment must be modified in this respect."

In Clark vs. Conley School District (Cal.) 261 Pac. 721, the court says:

> "It is argued that the trial court erred in refusing to allow the appellant interest from the time when the services were rendered until the date of the judgment. The argument is basd upon the rule that appellant's recovery was capable of being made certain by calculation (Civ. Code 3287) because the contract fixed his compensation at 6 per cent. of the cost of construction of the buildings. We have already said that this fee was based upon his services to be rendered not only in the preparation of plans and estimates, but also in the supervision of the construction of the buildings. If the cause were being tried upon the first cause of action alone, it may be that evidence could be had of the prevailing customs and of the surrounding circumstances which would justify an interpretation of the contract fixing a promise to pay for the services rendered in the preparation of plans and estimates in the event the building program was abandoned and in such a case the

certainty of the amount due might be easily determined by mere calculation. But so far as appears from this record, such evidence was not before the trial court, and in any event no finding was made thereon. *The judgment was manifestly given on the third cause of action alone—an action in quantum meruit.*

The reasonable value of services rendered was the precise question to be determined by the trial court upon the evidence offered under that cause of action, and the *amount due thereunder could not be determined by mere calculation.* Such being the case, *the claim should bear interest from the rendition of the judgment only.*"

In Shellenberger vs. Baker, et al. (Cal.) 281 Pac. 1102 an attorney brought suit in quantum meruit for the reasonable value of legal services and recovered a certain sum with interest thereon from the date of the termination of services which he rendered ,although his suit was not brought until sometime thereafter. The court modified the judgment by striking the interest allowance therefrom. The following is quoted from the decision of the court, namely:

"Appellant also contends that the trial court erred in awarding interest to Plaintiff at the rate of 7 per cent. per annum on the sum of $650 at the date of the termination of the services rendered by plaintiff to defendants.

Perhaps the leading case in this state on the question thus presented is that of Cox v. McLaughlin, 76 Cal. 60, 18 P. 100, 9 Am. St. Rep. 164. It is there held that: 'In an action to recover the reasonable value of services performed by the plaintiff, the amount, character, and value of which can only be established by evidence in court, or by an accord between the parties, and which are not susceptible of ascertainment either by computation or by reference to market rates, the plaintiff is not entitled to interest prior to verdict or judgment.'

To the same effect see Swinnerton v. Argonaut L. & D. Co., 112 Cal. 375, 44 P. 719; Macomber v. Bigelow, 123 Cal. 532, 56 P. 449.

In the case of Erickson v. Stockton & Tuolumne County

R. R. Co. 148 Cal. 206, 82 P. 961, it is held that interest is not recoverable on an unliquidated claim for the value of services rendered even from the time of the commencement of an action. See, also, Gray v. Bekins, 186 Cal. 389, 199 P. 767; Tryon v. Clinch, 44 Cal. App. 629, 186 P. 1042; Hind v. Uchida Trading Co. 55 Cal. App. 260, 203 P. 1028; Arocena v. Sawyer, 60 Cal. App. 581, 213 P. 523; Diamond Match Co. v. Aetna Casualty, etc. Co., 60 Cal. App. 425, 213 P. 56; 8 Cal. Jur. 789, 790, 796, and cases there cited."

The reason for the rule so announced by the California courts is well set forth in Cox vs. McLaughlin, referred to in the California case, supra. There the court said:

"The case at bar is not an action upon an express contract between the parties. Such a contract, it is true, existed; and, had plaintiff recovered under it, he would have been entitled to interest upon the several payments provided for therein from the dates at which they fell due, but for reasons not now necessary to be enumerated a recovery upon the contract has been abandoned, and plaintiff counts upon a quantum meruit, for the performance of labor and services, precisely as he might have done had there been no contract. His services, and the material furnished by him, were uncertain as to amount, character, value, and time of payment, until fixed by a verdict or findings of the court. They were not of a character to have a fixed or ascertainable market value. They could not be ascertained by computation, either in extent or value. Defendant was not in default for not ascertaining that which, outside of the abandoned contract, he could not ascertain except by an accord, or by verdict or its equivalent."

It is respectfully submitted that these California cases effectually construe the Montana interest statute in question, Section 8662, supra. The law has been settled in California from the first that claims upon quantum meruit do not draw interest prior to findings or judgment. For the reasons set forth, supra, such, too, is the law of Montana.

And De Young vs. Benepe, 55 Mont. 306, 176 Pac. 609, the demands involved were upon a quantum meruit. Thus the court said:

> "Plaintiff brought his action in assumpsit instead of on the special agreement, upon the theory that having fully performed the agreement on his part he was at liberty to count on the implied assumpsit, limitation of recovery being the stipulated price."

It will be observed from a reading of the case that no interest was claimed or allowed.

In Daley vs. Kelley, 57 Mont. 306, 187 Pac. 1022, a suit in quantum meruit (page 311) where an express contract between the parties had been involved, the plaintiff recovered $800.00 only, without interest, (page 308) and the judgment was affirmed on appeal.

In Callan vs. Hample, 73 Mont. 321, 236 Pac. 550, the court again considers an action upon a quantum meruit wherein a principal sum only was recovered without interest.

While the question of interest was not involved or decided in the foregoing Montana cases, nevertheless they seem pertinent here. Litigants in Montana are neither claiming nor recovering interest in actions in quantum meruit.

Perhaps it will be contended in this Court that in Hefferlin, et al. vs. Karlman, et al. 29 Mont. 139, 74 Pac. 201, the point here involved has been decided adversely to our contention. It is only necessary to examine the decision to find that such is not the case. There the court refers to the pleadings and epitomizes them as follows, to-wit:

> "In the first count plaintiffs allege themselves to be copartners * * * Then follows an allegation that between the 15th day of September, 1899, and the 21st day of December, 1899, the plaintiff sold and delivered to the

> defendants, at their request, goods, wares and merchandise amounting to, and of the value of $1679.74, *which sum the defendants agreed to pay plaintiffs,* and that no part thereof has been paid."

An express agreement between the parties is thus pleaded and the allowance of interest made was proper. The action is not in quantum meruit and, therefore, the decision is not in point here. In a suit in quantum meruit the reasonable value and not the agreed value of goods, wares and merchandise is demanded.

Leggat vs. Garrick, 35 Mont. 91, 88 Pac. 788, may also be relied upon by the opposition to refute the contentions of the Appellant herein. In that case the action was one to recover a "balance of $100 for professional services rendered." Clearly it was one upon an express contract for a stated balance. The court allowed interest under the rule announced in Hefferlin vs. Karlman, supra, thus further establishing that the plaintiff sued for an agreed amount.

The Montana court is plainly limiting interest allowances to express contracts where a definite amount has been agreed upon as compensation. This rather clearly appears from Clifton, Applegate & Toole vs. Big Lake Drain District No. 1, 82 Mont. 312, 267 Pac. 207. There an estimate under a contract was not paid when allowed by the engineer. The court, upon appeal directed the entry of a judgment by the lower court for the amount of the estimate plus interest from the date when payment thereof was improperly refused, and relied in this connection upon Section 8662, supra, Revised Codes of Montana, 1921, and Hefferlin vs. Karlman, supra. In other words, the statute, as well as the decisions mentioned, relate entirely to express contracts where a definite amount of damages is involved or an

amount that can be made certain by mere calculation.

The circumstance must not be overlooked herein that the irrigation district sought to recover the principal sum of $19,284.95 in its complaint. The findings of the court gave it the principal sum of $10,870.40 or $8414.55 less than it tried to recover. The judgment herein for $17,963.72 is accounted for by the fact, as hereinbefore pointed out, that interest has been added to the above mentioned principal sum of $10,870.40, that is, interest running from 1922 and 1923, or thereabouts, to the date of the findings or judgment. The following statement shows the amount demanded and recovered for the use and benefit of the various claimants, namely:

	Amount Demanded	*Amount Recovered*
B. A. Kurk	$ 1163.20	$ 562.30
E. C. Riley	1,081.45	.....
W. H. Queenan	1,542.62	.....
C. F. Wickliff	3,787.00	368.83
J. J. Fallman	2,110.17	368.76
John I. Kunkle	880.00	850.00
Dave C. Yegen	1,324.00	1,324.00
B. J. Martin	6,753.32	6,753.32
B. J. Martin	643.19	643.19
	$19,284.95	$10,870.40

This detailed information does not clearly appear from the record herein but the figures as given are correct, as opposing counsel must necessarily concede. The interest allowances prior to findings and judgment on the several amounts recovered are clearly in contravention of the statute. These several amounts were not liquidated until the findings were made. Therefore, under the local law such amounts draw interest only from the date of the findings or judgment.

For all of the reasons set forth in the foregoing brief it is clear that the interest allowances made prior to the findings of the Court are contrary to law. To this extent the judgment entered is erroneous and it should be modified accordingly by the elimination therefrom of the sum of $7093.32, namely the difference between the principal amounts recovered, $10,870.40, and the principal amount of the judgment, $17,963.72.

Respectfully submitted,

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Service of the within and foregoing brief and receipt of copy thereof acknowledged this.....day of October, A. D. 1931.

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By.....

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